



To,
Telecom Regulatory Authority of India
advqos@traigov.in

January 21, 2019

Dear sir,

Re: Submission of our counter-comments to the Consultation on OTT Platforms and Services

The Internet Freedom Foundation (IFF) is a non-profit organization arising from the SaveTheInternet.in movement for net neutrality.

In April 2015, through the SaveTheInternet.in platform, over a million Indian citizens wrote and engaged with the TRAI and the Department of Telecommunications on consultative exercises to protect net neutrality. A core part of the submissions consistently aimed to prevent the licensing of internet platforms and services. To our dismay, we have noticed in the comments posted in response to the present consultation similar arguments for licensing of internet platforms and services resurfacing. These have primarily been made by telecom operators.

We submit that the underlying factors have not changed and many of the old arguments are being repackaged today under the cover of a regulatory imbalance and a threat to network investment. In our counter-comments, we highlight the submissions of service operators, who have largely seen the present consultation as an opportunity to extend a telecom licensing framework to the internet. This would harm users, innovation and satisfy no clear public policy goal.

We would like to restate our recommendations at the same time on the role of the TRAI for greater privacy protection and surveillance reform. This role can be positively carried out by TRAI in the telecom sector. For our detailed counter comments, for ease, we have prepared our submission in a tabular form which is attached to this covering letter.

Sincerely,

Apar Gupta
Executive Director
Internet Freedom Foundation
apar@internetfreedom.in

Question No. 1 Which service, when provided by the OTT service provider, should be regarded as the same or similar to services being provided by the TSPs? Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

Service Provider's Submissions	IFF Response
<p>Airtel: Services allowing a person to communicate with another individual or a group of target people, such as voice calls, video calls, message exchange through the OTT service provider are substitutable to the services provided by the traditional TSPs. They propose that the definition of OTT communication services by EU should be adopted in the Indian context as well. Social media and other gaming applications do not fall in the category of OTT communication services. The definition should be flexible to bring in other substitutable services under its ambit without hampering growth and technology.</p> <p>BSNL: Services providing voice calls, video calls, SMS, MMS, any messaging service and audio/video conferencing services may be regarded as similar to services given by TSPs.</p> <p>Cellular Operators Association of India (COAI): VOIP and messaging services provided by OTT communication services providers can potentially substitute telecommunications services. They suggest that TRAI may adopt the definition of "interpersonal communication services" suggested by the EU.</p> <p>Vodafone: Supports the definition in the EU framework of "interpersonal communications services" which is defined as "direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipients". OTT definition needs to be finalized to cover it as any service that may substitute or supplement telecom services.</p> <p>MTNL: All communication services for which incumbent TSPs have been authorized under their licenses should be considered for the purpose. They say that the OTT services comparable to the services of TSPs are- Voice over IP for voice calls, video chat services, instant messaging services, video and audio streaming services.</p> <p>Reliance: All online services which have substituted traditional telecommunications services such as voice calls and messaging should be considered the same or similar to services being provided by TSPs.</p> <p>Reliance JIO: Services which are functionally similar to services provided by TSPs should be regarded as communication services. They request the authority to adopt the classification proposed by the EU to define OTT. The definition must be flexible to include rapidly changing markets and technologies of the future.</p> <p>Tata: OTTs that provide a replacement service to the services offered by TSPs should be regarded as the same as services offered under a Telecom license in India. This includes services like Skype, Viber, Whatsapp, Facebook Messenger.</p>	<p>We submit and restate our original definition that OTT is a reductive term which reduces the diversity of functionality offered by online platforms and services. We urge that any attempt at a definition based on either the criteria of, "substitutability" or, "functionality" may be avoided at present.</p> <p>In our view, internet platforms and services and TSPs cannot be compared. Firstly, online providers are not substitutes because they are dependent on TSPs physical networks to provide their services. Secondly, they operate at different layers, with TSPs at the telecom layer and internet services at the application layer. Thirdly, TSPs have several advantages over internet platforms in terms of exclusive rights to acquire spectrum, to obtain numbering resources, to interconnect with PSTN, the right of way to set up infrastructure.</p> <p>Also, the internet services market is far more competitive and thereby they offer their services at nearly no cost. Further, internet platforms usually offer diverse services, not limited to the straight jacket categories of TSPs. Some of these services use messaging or call features to augment unrelated services and improve the consumer experience.</p> <p>We would also like to caution against the adoption of the EU framework which appears to be a proposal at present.</p>

Question No. 2: Should 'Substitutability' be treated as the primary criteria for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

Service Provider's Submissions	IFF Response
<p>Airtel: Yes, substitutability should be the main parameter for defining any service as an OTT communication service. Services may be identified as substitutable if they allow a person to communicate with another individual or a group of target people.</p> <p>BSNL: Yes, OTTs are substituting traditional telcos by offering low/no-cost services resulting in a decline in the demand for those causing a loss in revenue for TSPs. Increase in revenue from increased data consumption doesn't compensate for the loss from voice/SMS services being substituted.</p> <p>Cellular Operators Association of India (COAI): Yes, substitutability of a service should be one of the primary and important criteria. The test followed by EU in their electronic communication code may be applied to determine whether the functionality forms a 'substantial' or 'ancillary' part of the service/platform.</p> <p>Vodafone: Yes, substitutability should be the criteria. They have cited an EU recital which says that end-users are increasingly substituting services by TSPs such as voice calls, messaging etc. with 'functionally equivalent' online services.</p> <p>MTNL: Scope of consideration should not be limited to 'substitutability'. All communication services authorized to TSPs under their license should be considered under the present context.</p> <p>Reliance: Substitutability should be treated as the primary criteria for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers. Any OTT application providing above services within or using the same platform should be considered to identify and discover the extent of substitutability.</p> <p>Reliance JIO: Demand-side substitutability should act as the criteria. Any platform that allows for one-to-one communication outside of TSPs has the potential to be a national security risk and must, therefore, be properly regulated.</p> <p>Tata: Strongly agree with substitutability as the criteria. OTTs utilize TSP infrastructure and make large amounts of profits that don't go back to the government or to the people who provide the infrastructure. There also exists a national security risk if OTTs are not regulated.</p>	<p>According to us, the substitutability criteria is an incorrect premise to base any regulation as several other bases exist to examine the economic interaction between telecom services and internet services. We would submit these services are by their very nature complementary rather than being substitutes. For instance, as the ITU report on "Regulatory challenges and opportunities in the new ICT ecosystem" as cited in some responses, online messaging platforms have significant additional functionality, because, <i>"while a portion of IP messaging is a substitute for SMS services, not all such messaging would have been SMS traffic"</i>. Hence, their functionality extends beyond and does not compete with the functionality of an SMS.</p> <p>These include indicatively, ubiquity and adoption, consumer welfare, addressable markets, innovation, the level of competition, maturity of the industry, the lifecycle of product/services and impact in the economy, nature of the underlying technology, switching costs etc. are all important factors to consider. An analogy for this would be to compare airlines to cars or railways and to try to apply the same regulatory standards to them which wouldn't work out.</p> <p>Invoking substitutability to justify regulation or licensing requirements for online services will hurt consumers and the industry creating new barriers to entry for both new apps and service providers by raising the cost of service which would be unfavourable as the low barriers to entry, open nature of the internet and rich interactions and experiences that online application and content providers enable are key to the continued growth of the digital economy and for user's who are its ultimate beneficiaries.</p>

Question No. 3: Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required for time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answers.

Service Provider's Submissions	IFF Response
<p>Airtel: They agree that increasing usage of OTT services has led to higher consumption of mobile broadband network facilitated by TSPs to cater to huge traffic being generated by the OTT service providers. They believe that higher network utilisation is contributing towards increased revenues which would lead to higher investments in TSPs networks.</p> <p>BSNL: Yes, because TSPs burden the main costs, have to comply with regulatory requirements, face penalties for non-compliance. OTTs provide direct competition to TSPs without having the same burden.</p> <p>Cellular Operators Association of India (COAI): Yes, the regulatory imbalance between TSP and OTT communications provider is impacting the sustainability of the TSP's. The telecom industry will require INR 200,000 crores over the next 3-5 years for network capacity expansion and technology up gradation. They recommend reviewing the taxes/ levies on the operators to ensure that the telecom industry remains financially stable.</p> <p>Vodafone: TSPs have regulatory requirements such as investment into the creation and maintenance of high-speed networks, high licensing and taxation regime etc. which OTTs don't have to deal with. They argue that the non-level playing field the OTTs enjoy means that presently, they do not have a sustainable business case which prevents them from investing in improved broadband infrastructure which also inhibits the growth of OTT services.</p> <p>MTNL: There exists an imbalance. OTT services replacing TSPs means that Telecoms lose out revenue in these areas. Also, data tariffs have gone extremely low because of price competition and predatory pricing by some of the players. OTTs should have a revenue sharing model that allows them to compensate the infrastructure costs, spectrum fee, license fee etc.</p> <p>Reliance: Yes, the regulatory imbalance is affecting the sustainability of TSPs. A substantial part of international traffic has been shifted over to OTT. TSPs revenue is subject to licensing fee and entry fee while OTTs have no such burden. This imbalance also affects the TSPs ability to invest in better networks.</p> <p>Reliance JIO: It cannot conclusively be said that OTT traffic is impacting investment in telecom networks. Yes, the syphon off a part of the revenue through substitutable services, but they also create revenue in terms of data usage. They do not recommend imposing license or fees on OTT and instead say that existing fees on TSPs should be decreased to allow them more capital to use for investments etc.</p> <p>Tata: OTTs use TSP infrastructure and TSPs benefit because of the excess data consumption, however, there is an imbalance in the revenue they get. The regulatory framework should require OTTs to invest in network infrastructure before they can roll out services in India. Regulations regarding calling services, gaming, content broadcast etc. must be standardized between OTTs and TSPs.</p>	<p>We would like to refer to our economic analysis as we had first put it in our submission which clearly shows that there is not only a lack of causation, but even correlations between a purported, "regulatory or licensing imbalance" and, "infusion of investments in the telecom networks". We urge for specific data to evidence these claims.</p> <p>As per our economic analysis, the poor financial health of the telecom sector is because of the intense price competition between infrastructure providers which has hurt the margins of TSPs. We do agree that there may be a need to rationalise the tax burden and levies on TSPs however that is an issue for telecos to satisfy with data and evidence.</p> <p>We further submit that investments made by TSPs into their networks are primarily due to revenue opportunities offered by providing data services for accessing online services and applications. Online providers have to lead the investment in this sector by building physical facilities such as data centres, fiber networks, servers and routers.</p>

Question No. 4: Would interoperability among OTT services and also interoperability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answers with reasons.

Service Provider's Submissions	IFF Response
<p>Airtel: Interoperability would hinder innovations in the OTT space. Any requirement for interoperability should be left to market forces and technical innovations.</p> <p>BSNL: Interoperability will promote healthy competition and benefit users.</p> <p>Cellular Operators Association of India (COAI): Interoperability between OTT services should not be mandated and should be left to market forces.</p> <p>Vodafone: Interoperability is not currently necessary to promote competition.</p> <p>MTNL: Interoperability will be beneficial only for new operators using IP based network technology.</p> <p>Reliance: Interoperability would promote competition and can be done through light touch licensing of OTT service providers.</p> <p>Reliance JIO: Interoperability goes beyond the purview of light touch regulations and therefore should not be considered at this time.</p> <p>Tata: Interoperability amongst OTTs can only happen when the Government of India takes a stance on PUBLIC E.164 Number Mapping (ENUM) standard services in India.</p>	<p>We support interoperability on online services and platforms through a data protection and a competition law framework. At the same time, this is an issue which falls outside the concern of telecom regulation.</p>

Question No. 5: Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.

Service Provider's Submissions	IFF Response
<p>Airtel: Due to encryption methods deployed by OTT service providers and their infrastructure being outside India, TSPs face difficulties to meet the requirements of national security. This also leads to issued in obtaining KYC details of the users by TSPs, and therefore Government agencies cannot effectively ensure lawful interception or protect consumer privacy. They argue in favour of a regulatory framework mandating the requirement of LIM, compliance with data privacy requirements, maintenance of data within India and compliance with existing Indian regulations.</p> <p>BSNL: In the interest of national security, OTTs should be regulated by interception laws and maintain a local data centre to add ease to requests by an authority.</p> <p>Cellular Operators Association of India (COAI): OTT communication service providers should be subjected to the rules to meet the national security and privacy norms. Data mining by some content providers is a risk to the customer's privacy and security. Further problems arise when data is stored outside India. They propose provisioning of LIM, record maintenance, subscriber</p>	<p>We restate our submission on the need for a comprehensive privacy law with surveillance reform to overhaul the present regulatory apparatus. We submit that the present regulations and rules for decryption are already onerous and against the fundamental right to privacy.</p> <p>We urge the TRAI to take steps to safeguard privacy by service operators and urge for a separate consultation paper on it.</p>

<p>traceability, sharing customer details with law enforcement agencies and compliance with other Indian regulations.</p> <p>Vodafone: Rules associated with lawful interception must be equal between OTT and TSPs to enable security agencies to get this information. OTTs presently store their data overseas while TSPs have regulations that prevent data from leaving the country.</p> <p>MTNL: OTTs must comply with the same regulations as TSPs. They must be required to out their content/servers in India. Maintain records of data, communications, decoded content to be shared with government/LEAs.</p> <p>Reliance: In the interest of national security, OTTs should have the same Legal Interception and Monitoring (LIM) requirements as TSPs. Also, there must be a decryption key for their data accessible by the Government.</p> <p>Reliance JIO: The biggest problem with OTT providers is that they are overseas so there is no jurisdiction for authorities to demand data. Also, the information is encrypted which means an authority cannot read the same. As such OTTs should comply with LIM requirements. They also support a comprehensive data privacy law to help protect people's rights and freedoms.</p> <p>Tata: The responsibility of national security should be equal to both TSPs and OTTs. The best way for this is to consider Public E-NUM services. They also contend that as OTTs do not have their company or any liabilities in India means that they are not concerned with security and just view citizens as a means of revenue.</p>	
--	--

Question No. 6: Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

Service Provider's Submissions	IFF Response
<p>Airtel: No, because OTT Service Providers are not interconnected to the PSTN network. However, they can deploy a centralized emergency response centre which can be connected to 112 deployed by various states. It may be desirable but not mandated to provide an option to route the traffic directly to the response centres.</p> <p>BSNL: Yes they should provide emergency services as additional safety for the public is a good thing.</p> <p>Cellular Operators Association of India (COAI): Emergency services are desirable, however, do not need to be mandated.</p> <p>Vodafone: Provision of emergency services by OTTs should be desirable but not mandated. However, they should be required to inform users about the lack of the same.</p> <p>MTNL: It would be better for OTTs to have emergency services on par with those TSPs provide because a lot of people use these services.</p> <p>Reliance: Emergency services should be mandated in the same manner as TSPs.</p> <p>Reliance JIO: OTT service providers should be encouraged, not mandated, to provide emergency services.</p> <p>Tata: OTTs should provide emergency services especially because the medium allows for an enhanced version of emergency services that TSPs can't provide.</p>	<p>We restate our initial submissions and only online services that offer video calling which can originate and terminate on a PSTN network may require provision for emergency calls. Even in these instances in most cases, users do not have any expectation of such features as to route such calls they rely on the pre-existing voice calling features on their smartphones.</p>

Question No. 7: Is there an issue of the non-level playing field between OTT providers and TSPs providing the same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulations and licenses with justification.

Service Provider's Submissions	IFF Response
<p>Airtel: Yes, having a 'same service same rule' policy is important to protect competition. The regulatory requirements of OTT service providers should be limited to the provisioning of services and should not include the regulatory requirement for building the network. A light licensing requirement with compliance to lawful interception, localization of consumer sensitive data, consumer privacy, subscriber verification/KYC, traceable user identity, record maintenance, and compliance with other Indian regulations would be adequate.</p> <p>BSNL: Yes, there exists an uneven playing field. TSPs are highly regulated and OTTs don't have the same burdens. If OTTs aren't brought under a licensing regime, it will impede the efforts of TSPs to upgrade the network across the country.</p> <p>Cellular Operators Association of India (COAI): Yes, there are regulatory imbalances between TSPs and OTTs. The existing regulatory and licensing conditions imposed on TSPs should be reviewed and minimised. However, OTT communications services should be subject to critical compliances such as Security/ Lawful Interception & Monitoring, Customer Data Privacy and Data Localization.</p> <p>Vodafone: Yes, there is a non-level playing field as TSPs have a lot more regulations to comply with. This non-parity broadly exists in terms of financial conditions, security conditions, consumer protection conditions and commercial conditions. The exact regulatory differences have been detailed in their submission.</p> <p>MTNL: (Same answer as the one to Q3)</p> <p>Reliance: Multiple OTT services may be considered perfect substitutes to services offered by TSPs, however, only TSPs have to deal with the regulations thereby creating a non-level playing field that hampers the latter's ability to compete fairly in the marketplace.</p> <p>Reliance JIO: In terms of financial levies, the uneven playing field between OTTs and TSPs is not a clear and present concern. However, there needs to be regulation regarding LIM and data privacy laws.</p> <p>Tata: Yes, there are imbalances. They believe that OTT should have regulatory mandates regarding- Lawful Interception, takedown obligations, privacy and cyber-security obligation, license compliance, revenue sharing, tax compliance.</p>	<p>Since internet services and platforms and TSPs offer fundamentally different services, any regulation should also be suited as per the specific public policy need. While we support greater scrutiny on internet services and platforms through the competition law and consumer protection frameworks we oppose any telecom style licensing system being extended to them.</p> <p>The argument of, "same service, same rules" has been conclusively debunked and discredited in earlier instances of consultations. It is also relevant to consider that licensing of online platforms and services would force them to pay exorbitant fees which would disincentivize small companies and innovators as it would disproportionately increase costs and create conflicts which would deprive users of many of the services we enjoy today. This could create entry-level barriers and also impair the ability of Indian businesses to use online applications to grow and reach more people.</p>

Question No. 8: In case, any regulation or licensing condition is suggested to be made applicable to OTT service providers in response to the previous question, then whether such regulations or licensing conditions are required to be reviewed or redefined in the context of OTT services or may these be applicable in the present form itself? If review or redefinition is suggested, then propose or suggest the changes needed with justifications.

Service Provider's Submissions	IFF Response
<p>Airtel: Licensing requirements for OTT service providers should be limited in comparison to TSPs to allow flexibility for technological innovations and developments. They should be brought under light licensing and regulatory norms.</p> <p>BSNL: TRAI needs to examine the details.</p> <p>Cellular Operators Association of India (COAI): OTT communications services can be licenced by introducing the OTT Communication Authorization under the Unified License. OTTs should be subject to compliances such as Lawful Interception & Monitoring, Customer Data Privacy, Data Localization, and UCC Regulations.</p> <p>Vodafone: Emphasize that all rules need to be reviewed and lightened to be uniformly applicable to all so that both players operate under a balanced and uniform regulatory framework/regime.</p> <p>MTNL: Both OTTs and TSPs should be treated at par in terms of regulatory/licensing provisions pertaining to privacy/security issues. However, issues related to QoS, revenue sharing and other commercial issues should be left to be decided by market forces.</p> <p>Reliance: The regulatory imbalances include- Quality of service parameters, obligations under Telegraph act, customer care set up, UCC compliance, emergency and public utility services, monitoring services, payments to exchequer including GST.</p> <p>Reliance JIO: Propose that financial regulations, QoS etc. should not be imposed on OTT service providers to allow them to innovate and grow. However, they should be required to develop mechanisms which deal with fake identity, fake news, rumours etc. which may culminate in a threat to national security.</p> <p>Tata: OTTs should be under obligations to provide real-time communications and internet peering/interconnections.</p>	<p>Since we have not suggested any licensing conditions, no review or redefinition is required. We urge the authority not to consider ancillary concerns which have been raised by service providers particularly by Reliance Jio on issues such as fake identity, misinformation etc. which are much beyond the remit of the present consultation and likely to harm user rights of privacy and free expression.</p> <p>We strongly oppose the suggestion by COAI to extending provisions of the Unified License to internet services and platforms.</p>